Supreme Court, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1131

IN THE

Supreme Court of the United States

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

GREGORY O'DUDEN *
General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

BARBARA A. ATKIN
Deputy General Counsel

LARRY J. ADKINS
Deputy General Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, DC 20006
(202) 572-5500

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. SECTION 7121(a)(1), AS AMENDED, DOES NOT AFFECT THE RIGHT OF FEDERAL EMPLOYEES TO SEEK JUDICIAL REDRESS FOR VIOLATIONS OF THEIR CONSTITUTIONAL AND STATUTORY RIGHTS	7
A. The District Court Had Subject Matter Jurisdiction over Petitioner's Challenge to FAA's Drug-Testing Program Under 28 U.S.C. § 1331	7
B. The Ninth Circuit's Decision Requiring Petitioner To Establish that the CSRA *Conferred* Jurisdiction over His Claims on the Federal Courts Was Erroneous and Would Strip the Federal Courts of Jurisdiction over a Broad Variety of Legal Claims that They Have Traditionally Adjudicated	9
C. Congress Amended 5 U.S.C. § 7121(a) To Confirm that the Negotiated Grievance Procedure Is Exclusive only as to Other Administrative Remedies, and not as to Judicial Causes of Action	11

TABLE OF CONTENTS—Continued

Page

1. The plain language of the statute confirms that Congress was repudiating the Federal Circuit's decision in *Carter*, which held that negotiated procedures were exclusive as to judicial causes of action 11
2. The legislative history of the 1994 amendment supports the plain meaning of its text 16
3. The policy arguments of the government are without merit..... 20

II. THE CSRA DOES NOT IMPLICITLY PRECLUDE PETITIONER FROM PURSUING EQUITABLE RELIEF DIRECTLY IN FEDERAL COURT TO CHALLENGE VIOLATIONS OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS ARISING OUT OF FAA'S DRUG-TESTING PROGRAM 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 9
AFGE v. Martin, 969 F.2d 788 (9th Cir. 1992)..... 8
AFGE v. Roberts, 9 F.3d 1464 (9th Cir. 1993)..... 8
Air Line Pilots Ass'n v. Northwest Airlines, 199 F.3d 477 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc)..... 22
Amell v. United States, 384 U.S. 158 (1966)..... 10
Artuz v. Bennett, 531 U.S. 4 (2000)..... 20
ASEDAC v. Panama Canal Comm'n, 329 F.3d 1235 (11th Cir. 2003) 4, 15
Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 14, 22
Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984)..... 9
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 11
Bosco v. United States, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g)..... 2, 26
Bowen v. Mich. Acad. of Physicians, 476 U.S. 667 (1986)..... 9, 10
Bowsher v. Synar, 478 U.S. 714 (1986) 3
Brune v. Internal Revenue Serv., 861 F.2d 1284 (D.C. Cir. 1988)..... 3
Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983)..... 12
Bush v. Lucas, 462 U.S. 367 (1983)..... 28
Carter v. Gibbs, 690 F. Supp. 897 (C.D. Cal. 1988)..... 13
Carter v. Gibbs, 883 F.2d 1563 (Fed. Cir. 1989).. 13
Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.) (*en banc*), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990)..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984)	11
Cornelius v. Nutt, 472 U.S. 648 (1985)	25
Fort Stewart Sch. v. FLRA, 495 U.S. 641 (1990)	28
Garcia v. United States, 469 U.S. 70 (1984)	16
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	22
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)	11
Karahalios v. NFFE, 489 U.S. 527 (1989)	*passim*
Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985)	9
Lorillard v. Pons, 434 U.S. 575 (1978)	15
Mansell v. Mansell, 490 U.S. 581 (1989)	16
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	15
Mudge v. United States, 308 F.3d 1220 (Fed. Cir. 2002)	*passim*
NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989)	8
NFFE v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987)	10
NTEU v. Bush, 891 F.2d 99 (5th Cir. 1989)	3, 8
NTEU v. Chertoff, C.A. No. 05-201, 2005 U.S. Dist. LEXIS 17216 (D.D.C. Aug. 12, 2005)	2, 11
NTEU v. Devine, 591 F. Supp. 1143 (D.D.C. 1984)	3
NTEU v. Devine, 733 F.2d 114 (D.C. Cir. 1984)	2, 11
NTEU v. Helfer, 53 F.3d 1289 (D.C. Cir. 1995)	2
NTEU v. Horner, 854 F.2d 490 (D.C. Cir. 1988)	2
NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974)	3
NTEU v. United States, 950 F.2d 1562 (Fed. Cir. 1991)	2

TABLE OF AUTHORITIES—Continued

	Page
NTEU v. United States, 54 Fed. Cl. 791 (2002)	2
NTEU v. U.S. Customs Serv., C.A. No. 79-1208, 1982 U.S. Dist. LEXIS 17952 (D.D.C. Feb. 18, 1982)	3
NTEU v. U.S. Customs Serv., 27 F.3d 623 (D.C. Cir. 1994)	3, 8
NTEU v. U.S. Dep't of Treasury, 25 F.3d 237 (5th Cir. 1994)	3
NTEU v. Von Raab, 489 U.S. 656 (1988)	*passim*
NTEU v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986, *vacated by* 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part by* 489 U.S. 656 (1989)	10
NTEU v. Weise, 100 F.3d 157 (D.C. Cir. 1996)	2
NTEU v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990)	3, 8
Pyner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997)	22
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)	18
Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000)	22
Skinner v. Ry. Labor Executives Assoc., 489 U.S. 602 (1989)	8
Steadman v. Governor, U.S. Soldiers' & Airmen's Home, 918 F.2d 963 (D.C. Cir. 1990)	29
United States v. Emmons, 410 U.S. 396 (1973)	18
United States v. Erika, 456 U.S. 201 (1982)	27
United States v. Fausto, 484 U.S. 439 (1988)	*passim*
United States v. NTEU, 513 U.S. 454 (1995)	3
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)	11
Weaver v. U.S. Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996)	29

TABLE OF AUTHORITIES—Continued

	Page
Webster v. Doe, 486 U.S. 592 (1988)	5, 10
Weinberger v. Salfi, 422 U.S. 749 (1975)	10
Wilner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991)	8

STATUTES AND REGULATIONS

Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4361 (1994)	15, 16, 18
Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*	*passim*
5 U.S.C. § 702	8
5 U.S.C. § 704	8
5 U.S.C. § 706	8
Back Pay Act, 5 U.S.C. § 5596	2, 24, 26
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)	*passim*
5 U.S.C. § 2302(a)	28
5 U.S.C. § 2302(a)(2)	27
5 U.S.C. § 2302(a)(2)(A)	24
5 U.S.C. § 2302(a)(2)(A)(x)	28
5 U.S.C. § 2302(a)(2)(A)(xi)	28
5 U.S.C. § 2302(b)	27, 28
5 U.S.C. § 2302(b)(1) – (b)(12)	13, 27
5 U.S.C. § 4303	24
5 U.S.C. § 7103(a)(9)	12
5 U.S.C. § 7121	18, 19
5 U.S.C. § 7121(a)(1)	*passim*
5 U.S.C. § 7121(a)(2)	12, 19
5 U.S.C. § 7121(d)	13, 15, 19
5 U.S.C. § 7121(e)	13, 15, 19
5 U.S.C. § 7121(g)	13, 19
5 U.S.C. Ch. 75	24

TABLE OF AUTHORITIES—Continued

	Page
Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*	*passim*
29 U.S.C. § 216(b)	4
Federal Pay Comparability Act,	
5 U.S.C. § 5303	2
5 U.S.C. § 5305(a)	3
Freedom of Information Act, 5 U.S.C. § 552	3
Prevailing Rate Act, 5 U.S.C. § 5341	2, 10
Privacy Act, 5 U.S.C. § 552a	3
Tucker Act, 28 U.S.C. § 1491	2, 10, 24
5 U.S.C. § 1214(a)	27
19 U.S.C. § 267	2
28 U.S.C. § 1331	*passim*
49 U.S.C. § 40122(G)	27
49 U.S.C. § 40122(g)(1)	12
49 U.S.C. § 40122(g)(2)(A)	12, 27, 28
49 U.S.C. § 40122(g)(2)(C)	12
49 U.S.C. § 40122(g)(3)	12
49 U.S.C. § 40122(g)(2)(H)	12
49 U.S.C. § 45104(8)	8

MISCELLANEOUS

"Authority To Investigate Complaints by Employees of the Federal Aviation Administration Alleging Reprisal for Whistleblowing," 21 Op. O.L.C. 178 (Sept. 23, 1997)	28
Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 1 (1994)	17
Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 2 (1994)	18
H.R. Rep. No. 95-1717 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860	15
H.R. 2721	17, 18, 19

TABLE OF AUTHORITIES—Continued

	Page
H.R. 2970	*passim*
S. Rep. No. 95-969 (1978)	25
To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. (1993)	16
139 Cong. Rec. H6379 (daily ed. Aug. 6, 1993)	16
140 Cong. Rec. H10614 (daily ed. Oct. 3, 1994)	18
140 Cong. Rec. H11422 (daily ed. Oct. 7, 1994)	18
140 Cong. Rec. S14670 (daily ed. Oct. 7, 1994)	18

IN THE

Supreme Court of the United States

No. 04-1131

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS* [1]

The National Treasury Employees Union (NTEU or the Union) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government nationwide. NTEU negotiates collective bargaining agreements, arbitrates grievances, and files unfair labor practice charges on behalf of the employees it represents.

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. No attorney for either party has authored this brief in whole or in part, and no person or other entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

Because conditions of federal employment are governed largely by provisions of federal law, including the Constitution, preserving employees' direct access to the federal courts is extremely important to NTEU and its members. NTEU has frequently represented its members' interests in federal court in a variety of matters, including: 1) suits in the United States Court of Federal Claims or the federal district courts based on violations of money-mandating statutes and brought under the Tucker Act, 28 U.S.C. § 1491, and the Backpay Act, 5 U.S.C. § 5596;[2] 2) pre-enforcement challenges to illegal agency regulations or policies under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*;[3] 3) actions for declaratory and injunctive relief involving statutes, regulations, or agency

[2] *See, e.g., Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (suit for back pay under Prevailing Rate Act, 5 U.S.C. § 5341); *NTEU v. United States*, 950 F.2d 1562 (Fed. Cir. 1991) (suit for overtime under 19 U.S.C. § 267); *NTEU v. United States*, 54 Fed. Cl. 791 (2002) (action for back pay on behalf of class of "special rate" federal employees denied annual adjustments mandated by 5 U.S.C. § 5303).

[3] *E.g., NTEU v. Weise*, 100 F.3d 157 (D.C. Cir. 1996) (challenging Customs regulation exempting employees from statutory overtime entitlement); *NTEU v. Helfer*, 53 F.3d 1289 (D.C. Cir. 1995) (challenging Office of Personnel Management (OPM) regulation exempting Federal Deposit Insurance Corporation from competitive hiring requirements); *NTEU v. Horner*, 854 F.2d 490 (D.C. Cir. 1988) (challenging OPM regulation exempting positions from competitive hiring requirements); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984) (challenging OPM regulations governing pay and other matters); *NTEU v. Chertoff*, C.A. No. 05-201, 2005 U.S. Dist. LEXIS 17216 (D.D.C. Aug. 12, 2005) (challenging regulations establishing a new human resources management system at the Department of Homeland Security).

policies that violate the Constitution, brought under 28 U.S.C. § 1331;[4] and 4) actions in district court where employees allege other statutory violations.[5]

In these cases, the United States has routinely argued that federal employees could not pursue their claims directly in federal court. Of particular relevance here is the decision of the Federal Circuit in a case that NTEU litigated—*Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990)—as well as NTEU's efforts to secure legislation clarifying 5 U.S.C. § 7121(a)(1) in the wake of that decision. In *Carter*, the Federal Circuit held that the former version of section 7121(a)(1) stripped hundreds of NTEU-represented employees of their

[4] *E.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (challenging constitutionality of Gramm-Rudman-Hollings Act, which eliminated federal retiree cost-of-living adjustment); *United States v. NTEU*, 513 U.S. 454 (1995) (holding statutory "honoraria" ban unconstitutional as applied to rank-and-file federal employees); *NTEU v. Von Raab*, 489 U.S. 656 (1988) (constitutional challenge to urinalysis drug-testing program at the U.S. Customs Service); *NTEU v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994) (random urinalysis at U.S. Customs Service); *NTEU v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (holding unconstitutional, in part, urinalysis testing of employees of U.S. Department of Agriculture); *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989) (challenge to Executive Order mandating government-wide urinalysis testing of federal employees); *NTEU v. U.S. Dep't of Treasury*, 25 F.3d 237 (5th Cir. 1994) (Fifth Amendment challenge to government questionnaire required for positions of public trust); *NTEU v. Devine*, 591 F. Supp. 1143 (D.D.C. 1984) (takings clause challenge to denial of cost-of-living adjustments to federal retirees).

[5] *E.g., Brune v. Internal Revenue Serv.*, 861 F.2d 1284 (D.C. Cir. 1988) (claim for damages by federal employee alleging violation of Privacy Act, 5 U.S.C. § 552a, during internal investigation); *NTEU v. U.S. Customs Serv.*, C.A. No. 79-1208, 1982 U.S. Dist. LEXIS 17952 (D.D.C. Feb. 18, 1982) (seeking access to studies of employee overtime under the Freedom of Information Act, 5 U.S.C. § 552); *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (mandamus action to require President to implement statutory pay adjustment pursuant to the Federal Pay Comparability Act, 5 U.S.C. § 5305(a)).

explicit individual statutory right to file suit in district court under the Fair Labor Standards Act, 29 U.S.C. § 216(b), because such claims were also covered by the negotiated grievance procedure. 909 F.2d at 1458.

In 1994, Congress responded favorably to NTEU's efforts to secure a clarification of the law by amending section 7121(a)(1) to overturn *Carter* and to clarify that the negotiated grievance procedure is only exclusive as to other administrative remedies, not as to judicial causes of action. Thereafter, NTEU provided legal representation to a federal employee before the Federal Circuit and obtained a decision from that court holding that the 1994 amendment reversed the *Carter* ruling. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). *Accord, ASEDAC v. Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003).

Nonetheless, the Ninth Circuit held, in conflict with the Federal and Eleventh Circuits, that federal employees may not invoke the jurisdiction of the federal courts to resolve legal claims that are related to their employment, where such claims are also covered by the grievance-arbitration procedure of an applicable collective bargaining agreement. The Ninth Circuit's decision would nullify the 1994 amendment, thereby resurrecting the result of the now statutorily-repudiated *Carter* decision. For those reasons, and given the importance of the jurisdictional issues presented, NTEU files this brief.

SUMMARY OF ARGUMENT

It is well established that the federal courts have jurisdiction under 28 U.S.C. § 1331, entirely independent of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (CSRA), to resolve federal employees' challenges to the constitutionality of urinalysis drug-testing programs. Nonetheless, the Ninth Circuit held below (Pet. App. 7a; 10a) that federal courts lack jurisdiction over all "employment-related" claims by federal workers, except in-

sofar as such jurisdiction is explicitly conferred by the CSRA. This ruling is inconsistent with the federal courts' routine exercise of jurisdiction over complaints similar to petitioner's, including this Court's exercise of such jurisdiction in *NTEU v. Von Raab*, 489 U.S. 656 (1988). It is also irreconcilable with the long-recognized presumption that agency actions are subject to judicial review and with this Court's long-standing policy of avoiding statutory constructions that would deny any judicial forum for a colorable constitutional claim. *See, e.g.*; *Webster v. Doe*, 486 U.S. 592, 603 (1988).

The Ninth Circuit's approach—holding that the district court lacked jurisdiction over petitioner's claim because nothing in the CSRA, including 5 U.S.C. § 7121(a)(1), as amended, conferred it—turned the proper analysis of the jurisdictional question on its head. The question on which this Court has granted review, and as properly framed in the petition for certiorari, is whether section 7121(a)(1) precluded the exercise of federal court jurisdiction, which exists independent of the provisions of the CSRA.

Indeed, the Ninth Circuit's pronouncement (Pet. App. 7a) that the federal courts lack jurisdiction over all "employment-related" claims by federal employees has sweeping implications. It would call into question the authority of the federal courts to hear a broad variety of cases over which they have traditionally exercised jurisdiction. These matters include suits like petitioner's that seek equitable relief for constitutional violations; suits in the Court of Federal Claims for damages under money-mandating statutes; and civil actions brought under the APA to challenge agency rules and regulations alleged to be inconsistent with statutes governing federal employees' rights.

There is nothing in the language, structure, or history of the CSRA to suggest that Congress intended the radical curtailment of federal employees' rights and the narrowing of federal court jurisdiction that follow from the Ninth Circuit's

approach. Indeed, Congress amended the CSRA in 1994 to reject the view that the Ninth Circuit embraced, under which employees are divested of their rights to pursue judicial redress and relegated to a union-controlled grievance procedure to adjudicate all legal claims related to federal employment.

As modified in 1994, 5 U.S.C. § 7121(a)(1) now provides, in pertinent part, that the grievance procedures found in a collective bargaining agreement "shall be the exclusive *administrative* procedures" for resolving covered grievances (emphasis added). Congress inserted the word "administrative" into section 7121(a)(1) in 1994 precisely for the purpose of repudiating the decision of the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1452 (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990), which had held that the prior version of the statute made the grievance procedure exclusive as to all other remedies, whether administrative or judicial. Under the lower court's ruling, this purposeful modification of the statute would have no effect at all. Employees covered by collective bargaining agreements (including those who have decided not to join the union) would be precluded from seeking judicial remedies, even for violations of their constitutional rights, and would be left only with a negotiated procedure under which their union—in its sole discretion—decides whether or not to pursue their claims to arbitration.

The Ninth Circuit's conclusion (Pet. App. 9a) that petitioner's claims were barred by this Court's decisions in *United States v. Fausto*, 484 U.S. 439 (1988), and *Karahalios v. NFFE*, 489 U.S. 527 (1989), was also erroneous. The Ninth Circuit employed an overly broad reading of the Court's holdings in those cases that was divorced from their underlying rationale.

In *Karahalios*, this Court declined to recognize an implied cause of action to enforce the duty of fair representation that the CSRA itself created, because Congress had designed a

scheme of administrative and judicial review to resolve such unfair labor practices. 489 U.S. at 536. *Fausto* established that the CSRA's scheme for resolving "adverse personnel actions" (*i.e.*, management actions taken on the basis of an employee's conduct or performance) evinced a congressional intent to preclude direct judicial review of such matters, except as provided in that scheme. 484 U.S. at 443-45. In both cases, the Court relied upon the specific language, structure, and history of the CSRA to identify evidence of deliberate congressional intent to preclude the employees there from bringing their legal claims directly to court. *Karahalios*, 489 U.S. at 533; *Fausto*, 484 U.S. at 443-44.

Petitioner's claims do not involve an adverse personnel action and do not arise out of rights granted by the CSRA. Further, petitioner is seeking equitable relief to remedy constitutional violations, and the administrative alternatives suggested by the Ninth Circuit do not provide for judicial review. Therefore, the Ninth Circuit erred when it held that Congress implicitly precluded employees like petitioner from seeking direct judicial review of violations of their constitutional and statutory rights arising out of urinalysis drug-testing programs.

ARGUMENT

I. SECTION 7121(a)(1), AS AMENDED, DOES NOT AFFECT THE RIGHT OF FEDERAL EMPLOYEES TO SEEK JUDICIAL REDRESS FOR VIOLATIONS OF THEIR CONSTITUTIONAL AND STATUTORY RIGHTS

A. The District Court Had Subject Matter Jurisdiction over Petitioner's Challenge to FAA's Drug-Testing Program Under 28 U.S.C. § 1331

Under 28 U.S.C. § 1331, the federal district courts have jurisdiction over civil actions that arise under the Constitu-

tion, laws, or treaties of the United States. Further, the Administrative Procedure Act (APA) provides that any individual who suffers a legal wrong as a result of final agency action for which there is no other remedy in court may file suit in district court unless a statute precludes judicial review or the action is committed to agency discretion by law. 5 U.S.C. §§ 702, 704, 706.

Urinalysis drug tests are "searches" within the meaning of the Fourth Amendment and are subject to its "reasonableness" standard, including the requirement that such tests not be administered on an arbitrary or discriminatory basis. *NTEU v. Von Raab*, 489 U.S. 656, 672 n.2 (1988); *Skinner v. Ry. Labor Executives Assoc.*, 489 U.S. 602, 621-22 (1989). While inartfully pled, the gravamen of petitioner's *pro se* complaint was that his employer, the Federal Aviation Administration (FAA), was violating these constitutional mandates (as well as a parallel statutory requirement, 49 U.S.C. § 45104(8)) by subjecting him to urinalysis drug tests on a non-random, targeted basis. As *Von Raab* illustrates, challenges of this nature are clearly within the subject matter jurisdiction of the federal courts under 28 U.S.C. § 1331. *E.g., NTEU v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994); *NTEU v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990); *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989); *AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993); *AFGE v. Martin*, 969 F.2d 788 (9th Cir. 1992); *Wilner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991); *NFFE v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989).

B. The Ninth Circuit's Decision Requiring Petitioner To Establish that the CSRA *Conferred* Jurisdiction over His Claims on the Federal Courts Was Erroneous and Would Strip the Federal Courts of Jurisdiction over a Broad Variety of Legal Claims that They Have Traditionally Adjudicated

The Ninth Circuit did not consider the well-established and independent basis for federal court jurisdiction over petitioner's statutory and constitutional causes of action that is provided by section 1331 and the APA. Instead, it began its analysis by declaring that the federal courts lack jurisdiction over all "employment-related" claims by federal workers, except insofar as such jurisdiction is explicitly conferred by the CSRA. Pet. App. 9a-10a. Relying upon this mistaken premise, the Ninth Circuit concluded that the district court lacked jurisdiction over petitioner's claim because 5 U.S.C. § 7121(a)(1), as amended, did not provide an express grant of such jurisdiction. *Id.* at 10a.

The Ninth Circuit's approach is contrary to the well-established principle that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778 (1985), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). This Court has found the presumption of judicial review rebutted only where there existed "specific language or specific legislative history that is a reliable indicator of congressional intent" to preclude judicial review, or where such intent is "'fairly discernible' in the detail of the legislative scheme." *Bowen v. Mich. Acad. of Physicians*, 476 U.S. 667, 673 (1986), quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Where, as here, the claim seeks equitable relief for a violation of *constitutional* rights, a "heightened showing is required" because a "serious constitutional question" would arise "if a

federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12; *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

The Ninth Circuit's pronouncement that the federal courts lack jurisdiction over all "employment-related" claims by federal employees has sweeping implications, well beyond petitioner's case. Under its reasoning, an arbitrator, rather than this Court, should have resolved NTEU's constitutional challenge to drug testing in *Von Raab*. Further, the Ninth Circuit's reasoning brings into question the jurisdiction of the federal courts over cases brought under the APA to challenge the lawfulness of regulations issued by the Office of Personnel Management and other agencies. It would also divest the district courts and the Court of Federal Claims of their long-standing jurisdiction over claims for back pay, arising out of violations of money-mandating statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*; the Prevailing Rate Act, 5 U.S.C. § 5341; and the many premium pay provisions of Title 5. *See, e.g., Amell v. United States*, 384 U.S. 158 (1966) (holding that Court of Claims has Tucker Act jurisdiction over federal employee claims for back pay under federal statutes and regulations).[6]

---

[6] In fact, the United States has pressed preclusion arguments in all of these contexts, based upon the same jurisdictional theories it promotes in this case. Other than in the Ninth Circuit, however, such preclusion arguments have consistently been rejected by the lower courts. *See NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987) (admonishing government counsel for having the "effrontery" to invoke what the court called a "discredited theory of subject matter jurisdiction"—namely, that the CSRA precluded it from reviewing federal employees' challenge to constitutionality of urinalysis drug testing); *see also NTEU v. Von Raab*, 649 F. Supp. 380, 384-385 (E.D. La. 1986), *vacated by* 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part by* 489 U.S. 656 (1989) (same); *Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (rejecting preclusion argument in suit for back pay under Prevailing Rate Act); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984) (affirming denial of motion to dismiss NTEU's pre-enforcement challenge to OPM regulations on grounds of CSRA preclusion); *NTEU v. Chertoff*, 2005 U.S. Dist. LEXIS 17216 at *49-*52 (denying government's motion to dismiss NTEU's challenge to lawfulness of regulations implementing new personnel system at the Department of Homeland Security).

The Ninth Circuit analyzed the jurisdictional question backwards. The issue is not whether section 7121(a)(1) conferred jurisdiction on the district court to consider petitioner's claims. Rather, the question before this Court, as properly framed in the petition for certiorari, is whether section 7121(a)(1) precluded the exercise of such jurisdiction, which exists independent of the provisions of the CSRA, as explained above.

C. Congress Amended 5 U.S.C. § 7121(a)(1) To Confirm that the Negotiated Grievance Procedure Is Exclusive only as to Other Administrative Remedies, and not as to Judicial Causes of Action

1. The plain language of the statute confirms that Congress was repudiating the Federal Circuit's decision in *Carter*, which held that negotiated procedures were exclusive as to judicial causes of action

The interpretation of a statute begins with its language. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Where that language is clear, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

Petitioner is subject to the FAA Personnel Management System, which incorporates a number of the provisions of the CSRA, including 5 U.S.C. Chapter 71.[7] Chapter 71 codifies the Federal Sector Labor-Management Relations Statute, which established "the first statutory scheme governing labor relations between federal agencies and their employees," *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983), and which requires that collective bargaining agreements in the federal sector "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. § 7121(a)(1). Under 5 U.S.C. § 7103(a)(9), a "grievance" includes "any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation, affecting conditions of employment." Because the collective bargaining agreement between the FAA and petitioner's union did not exclude statutory and constitutional challenges to drug tests from the scope of the grievance procedure, petitioner had the option of using that procedure to pursue those claims. *See* 5 U.S.C. § 7121(a)(2).

Section 7121(a)(1) of Title 5 currently provides, in pertinent part, that "[e]xcept as provided in subsections (d), (e), and (g) of this section, the [negotiated] procedures shall be

[7] The statute establishing the Federal Aviation Personnel Management System, as amended in 2000, permits the FAA Administrator to waive certain provisions of Title 5 of the United States Code governing federal personnel. 49 U.S.C. § 40122(g)(1). It nonetheless retains a number of the administrative procedures that are provided in the CSRA for review of "adverse personnel actions" and labor relations disputes, including: 1) the right to pursue grievances under collective bargaining agreements and to file unfair labor practices with the Federal Labor Relations Authority under Chapter 71 of Title 5 (*id.* § 40122(g)(2)(C)); 2) the right to file appeals of serious adverse personnel actions with the Merit Systems Protection Board, (*id.* § 40122(g)(2)(H) and (g)(3)); and 3) the right to file a complaint with the U.S. Office of Special Counsel under section 2302(b), "relating to whistleblower protection" (*id.* § 40122(g)(2)(A)).

the exclusive *administrative* procedures for resolving grievances which fall within its coverage" (emphasis added).[8] Before 1994, however, section 7121(a)(1) did not contain the word "administrative." Instead, it provided that the negotiated grievance procedure was the "exclusive procedure" for resolving matters that fell within its coverage. The absence of the word "administrative" led the Federal Circuit to read section 7121(a)(1) as the government urges it should still be read: to divest employees of their rights to pursue relief in federal court. *Carter v. Gibbs*, 909 F.2d 1452 (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990).

Carter arose out of a lawsuit brought under the FLSA, in which *amicus* NTEU provided legal representation to several hundred employees of the Internal Revenue Service. At the government's urging, the district court dismissed the suit on the grounds that 5 U.S.C. § 7121(a)(1), as then written, deprived it of jurisdiction over the plaintiffs' claims. *Carter v. Gibbs*, 690 F. Supp. 897 (C.D. Cal. 1988).

On appeal, a panel of the Federal Circuit held that the district court had misinterpreted section 7121(a)(1) to repeal by implication the plaintiffs' rights to bring FLSA enforcement actions in federal court. *Carter v. Gibbs*, 883 F.2d 1563 (Fed. Cir. 1989). Among other things, it observed that the legislative history of the CSRA signaled "that Congress in-

[8] Subsection (d) of section 7121 gives employees the right to elect the negotiated procedure or "statutory procedures" for resolving complaints of discrimination that constitute "prohibited personnel practices" under 5 U.S.C. § 2302(b)(1). Subsection (e) of 7121 preserves employees' rights to file appeals with the Merit Systems Protection Board to challenge serious adverse actions based on misconduct or poor performance, under Chapters 75 and 43 of Title 5. Subsection (g), which, like the word "administrative", was added to the statute in 1994, preserves employees' rights to file complaints with the Office of Special Counsel in cases involving prohibited personnel practices other than those identified in subsection (d).

tended the 'exclusive procedures' provision to foreclose access only to alternative administrative procedures for settling disputes, and not to bar judicial remedies expressly provided by other statutes." *Id.* at 1566-67.

The *en banc* Federal Circuit reversed. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc). It held that the text of section 7121(a)(1), in its original incarnation, contained no qualifying language confining its reach to "administrative" procedures and made the grievance procedure exclusive as to *all* other procedures, whether administrative or judicial. *Id.* at 1454-55.

The *en banc* panel's interpretation of section 7121(a)(1) was a dubious one. It ran afoul of the cardinal principle of statutory interpretation that disfavors repeals by implication (*United States v. Fausto*, 484 U.S. 439, 452 (1988)), and ignored the teachings of *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).[9] Further, the Federal Circuit failed to reconcile its conclusion with the statutory context in which the phrase "exclusive procedures" was used, or with the legislative history of the CSRA, which supported a significantly narrower reading of that phrase than the one the court endorsed. The statutory context as well as the direct history showed that Congress was only addressing the relationship between the negotiated grievance procedure and other administrative procedures for review of federal employment disputes when it enacted section 7121(a)(1), and

[9] *Barrentine* held that private-sector employees have an unfettered right to bring civil enforcement actions under the FLSA, without regard to collectively bargained procedures. 450 U.S. at 745. It held that FLSA rights are conferred on the plaintiffs "as individual workers, not as members of a collective organization," and that those rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* at 745, 740 (citations omitted).

that the provision had nothing whatsoever to do with direct judicial causes of action.[10]

In any event, in 1994, Congress corrected the Court's misinterpretation by adding to the statute the very term whose absence dictated the Federal Circuit's conclusion in *Carter*. Section 9(b) of the Act of October 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994). As modified, section 7121(a)(1) provides, in pertinent part, that a grievance procedure found in a federal sector collective bargaining agreement "shall be the exclusive *administrative* procedure for resolving covered grievances." (Emphasis added.)

It is well established, of course, that Congress is assumed to be aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Further, when Congress amends an existing statute, it is presumed to do so with knowledge of the interpretation that had been given to the existing statute, at least insofar as the amendment affects the existing statute. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

As the Federal Circuit held in *Mudge v. United States*, 308 F.3d 1220, 1228 (Fed. Cir. 2002), "[t]he plain language of § 7121(a)(1) as amended is therefore clear: while § 7121 (a)(1) limits the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her [collective bargaining agreement], the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances." *Accord, ASEDAC*, 329 F.3d

[10] *See* H.R. Rep. No. 95-1717 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2891 (explaining that under the original version of section 7121(a)(1), with the exception of administrative remedies available at subsections (d) and (e), "an employee covered by a collective bargaining agreement must follow the negotiated procedures rather than the *agency* procedures available to other employees") (emphasis added); *see also* Petition for Writ of Certiorari at 16-19, *Carter v. Goldberg*, 498 U.S. 811 (1990) (No. 89-1675) (discussing legislative history).

at 1239, 1241. The contrary argument of the government in this case (Gov. Resp. at 15-19) is inconsistent with the statutory text and must be rejected.

2. The legislative history of the 1994 amendment supports the plain meaning of its text

As this Court has held, "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984); *see also Mansell v. Mansell*, 490 U.S. 581, 592 (1989). Here, there is *nothing* in the legislative history to support the government's reading of the statute as amended. In fact, the background of Congress' amendment of section 7121(a)(1) supports the plain meaning of its text, as described above.

Section 9(b) of the Act of October 29, 1994, which added the word "administrative" to section 7121(a)(1), was ultimately enacted as part of H.R. 2970. Representative McCloskey originally introduced H.R. 2970 in the House of Representatives in August 1993, and it was referred to the House Post Office and Civil Service Committee shortly thereafter. 139 Cong. Rec. H6379 (daily ed. Aug. 6, 1993).

The original version of H.R. 2970 did not include an amendment to section 7121(a)(1). At hearings on the bill, however, NTEU officials testified before the Subcommittee on the Civil Service that section 7121(a)(1) should be amended to overturn the result reached in *Carter*, which they urged had misinterpreted congressional intent. *See To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv.*, 103d Cong. 20-23 (1993) (hereinafter "Hearings"). Then-NTEU President Robert Tobias testified that the Union was proposing "a change to existing law,

as interpreted by the Federal Circuit in *Carter v. Gibbs*, to ensure the negotiated grievance procedure is the exclusive administrative procedure, but does not supplant any remedies which allow Federal employees to be heard directly in Federal court." Hearings at 23.[11]

On July 13, 1994, before action was taken on H.R. 2970, the House Committee on Education and Labor issued a report on another bill, H.R. 2721, which had also been introduced by Rep. McCloskey. H.R. 2721 included a provision *identical* to the one that ultimately became law, which would amend 5 U.S.C. § 7121(a)(1) to add the word "administrative." The Committee explained that the amendment

> clarifies Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it covers. The grievance procedure was never intended to deprive employees of access to the courts. This clarification is necessary to correct an erroneous decision of the U.S. Court of Appeals for the Federal Circuit, *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied sub nom. *Carter v. Goldberg*, 111 S. Ct. 46 (1990), which denied employees the right to judicial review of claims under the Fair Labor Standards Act.

Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 1, at 56 (1994).

---

[11] *See also* Hearings at 21 (testimony of NTEU Assistant Counsel Timothy Hannapel) (proposing that section 7121(a)(1) be amended to ensure that the provision's exclusivity language conformed to Congress' original intent that the grievance procedure be exclusive only with respect to administrative remedies, and explaining that "Congress intended the grievance procedure to be a strong avenue but courts have misinterpreted that intent to take away the individual rights of individual employees [to go to court] under, for example, the overtime pay statutes and the Privacy Act . . . ").

The Committee on Post Office and Civil Service (the same committee that had held hearings on H.R. 2970) similarly reported favorably on H.R. 2721 on August 17, 1994. Its report stated that the purpose of the amendment "is to clarify that section 7121 is not intended to limit judicial remedies otherwise provided by law." *Federal Employee Fairness Act of 1994*, H. Rep. No. 103-599, pt. 2 at 16, 75 (1994).

Thereafter, in October 1994, Rep. McCloskey offered amendments to H.R. 2970 that included the language contained in H.R. 2721, adding the word "administrative" to section 7121(a)(1). 140 Cong. Rec. H10614 (daily ed. Oct. 3, 1994). H.R. 2970, including the amendments offered by Rep. McCloskey, passed both Houses of Congress on October 7, 1994, and was signed into law by the President on October 29, 1994. 140 Cong. Rec. S14670, H11422 (daily ed. Oct. 7, 1994); Pub. L. No. 103-424, § 9(b), 108 Stat. 4361, 4366 (1994).

The reports accompanying H.R. 2970 did not explain why Congress added the word "administrative" to section 7121(a)(1). Nonetheless, the reports that accompanied H.R. 2721, also offered by Rep. McCloskey, which would have made exactly the same change in section 7121(a)(1), are highly instructive, particularly when viewed against the backdrop of the hearing testimony NTEU officials presented on this issue. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 306-309 (1994) (examining legislative history of provision in vetoed bill that was identical to provision in later-enacted statute); *United States v. Emmons*, 410 U.S. 396, 405 n.14 (1973) (legislative history of unenacted bill "wholly relevant to an understanding of" subsequently enacted statute containing same operative language).

Thus, both H.R. 2721 and H.R. 2970 contained the identical "exclusive administrative procedures" language. Both bills were introduced by the same legislator (Rep. McCloskey). And, as described above, both bills were considered within

the same legislative session—in fact, within months of one another. Further, the explanation of the amendment to section 7121(a)(1) contained in the reports accompanying H.R. 2721 closely tracks the testimony that NTEU officials provided at the hearing on H.R. 2970. Therefore, it is clear that Congress intended to reverse *Carter* and to preclude only administrative claims covered by grievance procedures. Section 7121(a)(1), as amended, does not preclude employees from filing claims in federal district court.[12]

---

[12] The *Mudge* court properly rejected the argument of the government, repeated here (Gov. Resp. at 18-19), that Congress added the word "administrative" "to clarify the remedies available to federal employees for grievances" in light of the new subsection (g) of section 7121, which gave federal employees a choice of administrative remedies for grievances concerning prohibited personnel practices. There was "no need for Congress to clarify § 7121 in this fashion" because the pre-1994 statute, which already provided a choice of administrative remedies under subsections (d) and (e), had unambiguously made the negotiated procedure exclusive as to other administrative remedies. *Mudge*, 308 F.3d at 1228.

Similarly unpersuasive, as the *Mudge* court understood (*id.* at 1231), was the government's contention there that the plain meaning of section 7121(a)(1) should be disregarded because to do otherwise would allegedly render superfluous section 7121(a)(2) (which provides that the parties may agree to exclude any matter from the coverage of the negotiated procedure). The government based this contention on the erroneous notion that the sole function of subsection (a)(2) is to enable the union to preserve employees' rights to pursue judicial remedies by excluding matters from the coverage of the negotiated procedure. *See* 308 F.3d at 1231. The parties to a collective bargaining agreement may wish to exclude matters from the grievance procedure for any number of reasons, entirely unrelated to the effect of such exclusion upon employees' rights to judicial relief. These reasons range from the union's desire not to devote its resources to particular issues to an interest in channeling particular types of disputes to other administrative forums.

3. The policy arguments of the government are without merit

In its response to the petition for certiorari, the government makes several policy arguments in support of its tortured reading of section 7121(a)(1). *See* Gov. Resp. at 20-21. Of course, the government's policy arguments cannot overcome the plain language of the statute. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000). In any event, the government's arguments are meritless.

For example, the government claims (Gov. Resp. at 16-17) that giving section 7121(a)(1) its plain meaning, as *Mudge* required, "produces an anomalous result" under which employees who are covered by collective bargaining agreements have access to the federal courts while employees who are not so covered would be forced to litigate those cases exclusively through an internal agency grievance procedure. This contention rests upon the flawed central premise of its entire argument—namely, that *Mudge* held that section 7121(a) *conferred* jurisdiction on the federal courts to resolve legal claims that also constitute "grievances." On the contrary, *Mudge* held that section 7121(a)(1) does not *preclude* the federal courts from exercising the jurisdiction they otherwise possess over a federal employee's legal claims, solely because those claims are also covered by the negotiated grievance procedure. *See* 308 F.3d at 1227-33. This is, of course, materially different from a holding that section 7121(a)(1) operates as a new substantive grant of jurisdiction on the federal courts to resolve "grievances."

This reading of section 7121(a)(1) ensures that employees who are unrepresented by a union will not have greater rights of access to the federal courts than those who are so represented. In order to file suit directly in federal court, all employees, whether covered by a negotiated procedure or not, must still identify an independent statutory basis for the

federal courts to exercise their jurisdiction. Both categories of employees thus have *equal* rights.

For similar reasons, there is no merit to the argument of the government that, if the court's decision in *Mudge* stands, then the federal government will be compelled to litigate employee grievances in court "in the first instance," thereby resulting in "considerable delay and additional expense." Gov. Resp. at 21. As described below at pp. 25-26, consistent with this Court's decision in *Fausto*, all federal employees, both those who are covered by negotiated procedures and those who are not, are still precluded from invoking the jurisdiction of the district courts for the kinds of "exceptionally common" grievances to which the government apparently refers: the routine challenges employees pose to management assessments of their conduct and performance in the context of "adverse personnel action" cases—namely, removals, suspensions, denials of promotions, and the like. Similarly, consistent with this Court's decision in *Karahalios (see infra* p. 23), employees must also use the CSRA's administrative procedures to resolve labor relations disputes (*i.e.*, unfair labor practices and disputes over negotiability). These two categories, along with breaches of the collective bargaining agreement, comprise the vast majority of "grievances" filed.

It bears noting that, although 5 U.S.C. § 7121(a)(1) was amended over ten years ago, there is no evidence of a surge in federal employee suits brought in district court. As has been the case for over thirty years (and even before the decision of the Federal Circuit in *Carter*), employees tend to use their administrative remedies (including the negotiated procedure), even in many cases where judicial remedies also exist, because those administrative procedures are less formal and can often provide adequate relief to employees without the expense of hiring counsel.

Indeed, it is the government's argument that leads to anomalous results. For under the government's interpretation of

section 7121(a)(1), unions that agree to a broad scope grievance procedure in a collective bargaining agreement can divest covered employees of their individual entitlements to file suit to vindicate express statutory and even constitutional rights. Employees represented by unions (including those who choose not to join the union) would be left with only a negotiated grievance procedure, under which the union—in its sole discretion—decides whether or not to pursue their claims to arbitration.

This result is contrary to important public policies because a union, which has a statutory obligation to represent collective interests, may reasonably decide not to pursue the claims of a single individual. *See Barrentine*, 450 U.S. at 742 (holding that it would be contrary to the public interests underlying the FLSA to deny employees their rights to pursue overtime claims in federal court and to relegate them exclusively to the union-controlled grievance procedure). Unions are entitled to consider such factors as limited resources, competing interests, and a desire to maintain harmony among employees and their employer, when deciding whether to invoke arbitration. *See Pyner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (holding that negotiated grievance procedure does not preclude employees from pursuing judicial redress for violations of Title VII of the Civil Rights Act or other anti-discrimination statutes). [13]

For example, federal sector unions routinely negotiate with agencies concerning the procedures that will be used in conducting urinalysis drug testing of bargaining unit employees. In pursuing an agreement, the union must establish priorities based on the needs of the bargaining unit as a whole. It is certainly conceivable, therefore, that an individual employee might conclude that the negotiated testing procedures do not provide constitutionally adequate safeguards to ensure sufficiently reliable tests or random selection of employees. It is unlikely that the union would pursue the employee's statutory and constitutional claims in this circumstance. Thus, the result of the government's position here is that even the rights guaranteed to individuals under the Fourth Amendment, as well as their Fifth Amendment due process rights, could be unilaterally waived by their bargaining representative.

In short, considerations of policy do not support the government's tortured reading of section 7121(a)(1) as amended; indeed, they refute it. Accordingly, this Court should endorse the interpretation of section 7121(a)(1) that its plain language and legislative history require and reject the government's invitation to rewrite the statute to defy Congress' decision to repudiate the result in *Carter*.

II. THE CSRA DOES NOT IMPLICITLY PRECLUDE PETITIONER FROM PURSUING EQUITABLE RELIEF DIRECTLY IN FEDERAL COURT TO CHALLENGE VIOLATIONS OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS ARISING OUT OF FAA'S DRUG-TESTING PROGRAM

The Ninth Circuit relied upon this Court's decisions in *Fausto* and *Karahalios* for its holding that the federal courts lack jurisdiction over the "employment-related" legal claims of federal employees. *See* Pet. App. 9a-10a. Its reliance on these decisions was misplaced.

In *Karahalios*, this Court held that federal employees do not have an implied cause of action to enforce a union's duty

---

[13] For these reasons, a general consensus has emerged among the lower courts that, while *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), holds that an individual may prospectively waive his own statutory right to a judicial forum and agree to arbitrate violations of law, a union may not prospectively do so for him. *See Air Line Pilots Ass'n v. Northwest Airlines*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc) (digesting cases); *Rogers v. New York Univ.*, 220 F.3d 73, 75 & n.1 (2d Cir. 2000) (same).

of fair representation because the CSRA provided a comprehensive remedy for violation of that statutorily created obligation (an unfair labor practice charge filed with the FLRA, with judicial review in the regional courts of appeals). 489 U.S. at 533. Petitioner, however, is not seeking to enforce a right created by the CSRA; the question here is whether the CSRA implicitly precludes the federal courts from considering a cause of action conferred by the APA and from exercising their traditional jurisdiction under 28 U.S.C. § 1331 to address petitioner's statutory and constitutional challenges.

This Court's decision in *Fausto* is similarly inapposite. There, a non-veteran member of the "excepted service" challenged his suspension for misconduct under Chapter 75 of the CSRA by filing an action directly in the then-United States Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491, and the Back Pay Act, 5 U.S.C. § 5596. 484 U.S. at 443. This Court held that the Claims Court lacked jurisdiction over the employee's cause of action in light of the CSRA's scheme for review of adverse personnel actions.[14] *Id.* at 454-55.

In so ruling, the Court relied upon the language and structure of the CSRA, which it held evinced a "deliberate" decision by Congress to preclude employees who fell within Fausto's particular category (non-veteran members of the federal excepted service) from securing direct judicial review in a particular category of cases (adverse personnel actions).

[14] The phrase "adverse personnel action" is a term of art that is frequently used in federal sector parlance to describe a variety of personnel actions that may be taken against employees by management ostensibly on the basis of an assessment of an individual's performance or conduct. *See* 5 U.S.C. Ch. 75 (entitled "Adverse Actions"); 5 U.S.C. § 4303 ("Actions based on unacceptable performance"); 5 U.S.C. § 2302(a)(2)(A) (defining "personnel actions"). These include, among other things, removals, demotions, suspensions, reductions in pay, and negative performance evaluations. *See Fausto*, 484 U.S. at 446-447.

Id. at 455; *see also id.* at 443-44 (observing that "the CSRA 'comprehensively overhauled the civil service system,' . . . creating an elaborate 'new framework *for evaluating adverse personnel actions* against [federal employees], . . . '" and that the CSRA "prescribes in great detail the protections and remedies applicable *to such action* . . ."(citations omitted, emphasis added)).[15]

As this Court recognized, one of the central objectives of the CSRA was to reform a complicated system of administrative and judicial review of personnel actions that Congress considered an obstacle to management objectives of punishing misconduct and addressing inadequate job performance. *Fausto*, 484 U.S. at 445; *see also Cornelius v. Nutt*, 472 U.S. 648, 662 (1985), quoting S. Rep. No. 95-969, at 4 (1978) (noting that "one of the 'central tasks' of the Act was to '[a]llow civil servants to be able to be hired and fired more easily, but for the right reasons'"). Permitting an employee to pursue a direct judicial remedy in misconduct and performance cases would undermine that goal. Further, the structure of the CSRA demonstrated that Congress did not intend the category of employees at issue in *Fausto* to have any adverse action rights at all.

Significantly, the Court in *Fausto* did not base its decision upon the fact that the employee's legal claims were "employment-related," as the Ninth Circuit held (Pet. App. 9a-10a) and as the government asserts (Gov. Resp. at 12). On the contrary, the Court's decision was grounded in Congress'

[15] As the court noted in *Fausto*, Chapter 43 of Title 5, governing performance-based adverse actions, extended procedural protections to excepted service employees, but deliberately withheld from them the "right to seek either administrative or judicial review of the agency's final action." 484 U.S. at 446. In addition, the Court found it critical that Chapter 75, which governs adverse actions based on misconduct, defined on its face and with great precision the review rights of excepted service employees. *Id.* at 446-47.

clearly expressed intent with respect to the *specific type* of claim at issue—a challenge to a disciplinary suspension. This Court summarized its decision as holding that Congress' "deliberate exclusion of *employees in respondent's service category* from the provisions establishing administrative and judicial review *for personnel action of the sort at issue here* prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455 (emphasis added).

For this reason, as the Federal Circuit has correctly held, *Fausto* is not preclusive as to *all* causes of action related to federal employment. *See Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (holding that *Fausto* did not affect the long-standing authority of the Court of Federal Claims to hear federal employees' pay claims, based on money-mandating statutes). The court explained that *Fausto* focused on "'precisely drawn provisions' with respect to Board and judicial review of adverse actions . . . within Chapter 75 of the CSRA to infer a congressional judgment to preclude Board and judicial review altogether of adverse actions against non-preference eligible excepted service employees." 976 F.2d at 713 (citation omitted). As the court stressed, *Fausto* was grounded in "the peculiar context of adverse personnel actions," which "necessarily focus on the agency's appraisal of the misconduct of a particular employee." *Id.* at 714.

The Ninth Circuit completely overlooked this crucial distinction. Petitioner's claims do not involve an adverse personnel action—the type of claim at issue in *Fausto*. His claim concerns an allegedly illegal and unconstitutional drug-testing program, precisely the type of claim at issue in *Von Raab*.

The Ninth Circuit (Pet. App. 3a; 10a) purported to identify two possible options that the petitioner might have pursued under the CSRA to press his allegations of illegal and unconstitutional drug testing: 1) filing a grievance under the negotiated procedure, or 2) filing a complaint with the U.S.

Office of Special Counsel (OSC), alleging that requiring him to undergo the drug tests was a "prohibited personnel practice."[16]

These options, however, are a far cry from the kind of "precisely drawn provisions" (*United States v. Erika*, 456 U.S. 201, 208 (1982)) from which the Court inferred congressional intent to preclude a direct judicial cause of action in *Fausto*.

First, as described above, it is abundantly clear that Congress did not intend that petitioner's right to pursue his claims in the negotiated grievance procedure would preclude him from obtaining direct judicial review of his challenge to the drug-testing program. On the contrary, Congress amended the statute in 1994 to ensure the opposite result, and to reject an interpretation of the CSRA under which an employee's union could waive his right to secure judicial review by negotiating a grievance procedure covering the substance of his claims.

The other option the Ninth Circuit suggested (Pet. App. 10a)—filing a prohibited personnel practice complaint with OSC—is not an option at all for petitioner. OSC disavows any authority to investigate the complaints of FAA employees, except with regard to claims for whistleblower retaliation, and the statute does not provide such authority.[17] Fur-

---

[16] The U.S. Office of Special Counsel (OSC) is an independent agency that has jurisdiction to, among other things, receive and investigate complaints alleging the commission of "prohibited personnel practices," as defined at 5 U.S.C. § 2302(b). *See* 5 U.S.C. § 1214(a). A "prohibited personnel practice" occurs when an agency takes or threatens to take a "personnel action" (as defined at 5 U.S.C. § 2302(a)(2)) on one of the twelve illegal bases specified at 5 U.S.C. § 2302(b)(1)-(b)(12)).

[17] *See* www.osc.gov/ppp.htm#q2 (visited Aug. 30, 2005). Pursuant to 5 U.S.C. § 1214(a), OSC has jurisdiction to receive and investigate complaints alleging the commission of "prohibited personnel practices," as defined at 5 U.S.C. § 2302(b). Section 1214 of Title 5 is applicable to FAA employees under 49 U.S.C. § 40122(g)(2)(A) and (G). However,

ther, OSC's authority to receive and investigate complaints alleging the commission of "prohibited personnel practices" is limited to cases challenging a "personnel action" that was either threatened or taken. 5 U.S.C. § 2302(b). The definition of "personnel action" under 5 U.S.C. § 2302(a) does not include directing an employee to submit to a drug test. *See Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983) (observing that "certain actions by supervisors against federal employees, such as . . . warrantless searches, . . . would not be defined as 'personnel actions' within the statutory scheme").[18]

More important, even if the petitioner could fashion a claim that might arguably fall within OSC's authority to investigate, there is nothing in the CSRA to demonstrate that, in giving OSC such authority, Congress intended to concomitantly preclude employees from pursuing equitable relief for constitutional violations in federal court. A decision by OSC not to prosecute an employee's claim—even a constitutional one—is final and unreviewable. As a result, employees

---

the provisions of 5 U.S.C. § 2302(b) (defining the prohibited personnel practices that OSC may investigate) are inapplicable to FAA employees, with the exception of those "relating to whistleblower protection." 49 U.S.C. § 40122(g)(2)(A). Indeed, until the law was amended in 2000 to add a reference preserving the "provisions for investigation and enforcement as provided in chapter 12 of Title 5," the Justice Department had interpreted Title 49 to divest OSC of jurisdiction over whistleblower claims as well. *See* "Authority To Investigate Complaints by Employees of the Federal Aviation Administration Alleging Reprisal for Whistleblowing," 21 Op. O.L.C. 178 (Sept. 23, 1997).

[18] While a decision to order a psychiatric examination is identified by statute as a "personnel action" (5 U.S.C. § 2302(a)(2)(A)(x)), a direction to take a urinalysis drug test is not. Nor would the order to submit to a drug test be considered a "significant change in . . . working conditions." 5 U.S.C. § 2302(a)(2)(A)(xi). The phrase "working conditions" is generally read to encompass the physical circumstances under which work is performed. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645-646 (1990) (term "working conditions" most naturally refers to "circumstances" or "state of affairs attendant to one's performance of a job").

alleging a violation of their constitutional rights would have no judicial forum to hear those claims. Because such an outcome would present a "serious constitutional question" (*see* cases cited *supra* p. 9) and violate established precepts regarding the availability of judicial review of constitutional claims, the statute must not be interpreted in such a fashion, particularly in the absence of a clear expression of congressional intent.[19]

---

[19] There is no merit to the argument of the government that, even if petitioner may ultimately secure judicial review of his challenge to the FAA drug-testing program, he should be required to exhaust administrative remedies for pursuing his claims. Gov. Resp. at 23-26. One lower court—the D.C. Circuit—has required exhaustion where a constitutional claim is intertwined with or related to an adverse personnel action or with a claim that arises under the CSRA, if the CSRA remedy would be "fully effective" in remedying the constitutional violation. *E.g., Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1433-34 (D.C. Cir. 1996); *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). Petitioner's claims, however, do not involve an adverse personnel action or arise out of rights created by the CSRA; petitioner is seeking prospective relief against future unconstitutional drug tests. Even under the D.C. Circuit's approach, exhaustion is not required for claims seeking such relief. *See Weaver*, 87 F.3d at 1434 (holding that the employee was entitled to judicial review of her First Amendment challenge to a regulation despite theoretical availability of administrative remedy for oral admonishment). Further, as described above, petitioner's only administrative remedy would be to file a grievance under the negotiated procedure. In amending the statute in 1994, Congress made it clear that the existence of the grievance option does not affect employees' rights to seek relief directly in federal court. Requiring exhaustion of the negotiated grievance procedure would frustrate this intent. The government's exhaustion argument, accordingly, should be rejected.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

GREGORY O'DUDEN *
General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

BARBARA A. ATKIN
Deputy General Counsel

LARRY J. ADKINS
Deputy General Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1750 H Street, N.W.
Washington, DC 20006
(202) 572-5500

* Counsel of Record

Counsel for Amicus Curiae